

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

GARY DUANE KUNKLE,

Appellant.

No. 38093-5-II

UNPUBLISHED OPINION

Houghton, J. — Gary Kunkle appeals his conviction of communication with a minor for immoral purposes, arguing that the trial court erred in finding him competent to stand trial.

Concluding that the trial court did not abuse its discretion in finding him competent, we affirm.<sup>1</sup>

**FACTS**

On Kunkle's motion, the trial court ordered a competency examination of him and then held a competency hearing. Dr. Carl Redick, a psychologist at Western State Hospital, evaluated Kunkle. He declined to give an opinion on the ultimate fact regarding competency. He stated that the ultimate determination of competency centered on two issues: (1) Kunkle's ability to understand the court processes, procedures, and strategies and (2) Kunkle's ability to emotionally accept and deal with the charge against him.

---

<sup>1</sup> A commissioner of this court initially considered Kunkle's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

As to the first issue, Redick believed that Kunkle understood the charges against him. Although Kunkle denied knowledge of the charges, Redick stated this revealed a defensive posture common to persons of Kunkle's intelligence level. Redick stated that Kunkle was on the "edge of mild retardation and borderline functioning" and had an IQ of around 70. Report of Proceedings (Mar. 14, 2008) (RP) at 8. According to Redick, an individual with this intellectual capacity is routinely found competent to stand trial.

As to the second issue, Redick believed that Kunkle could deal with the emotional component of trial if his counsel developed a level of trust sufficient for Kunkle to feel comfortable relaying information. If Kunkle's counsel presented him with alternatives of consequences, Redick believed Kunkle could make decisions based on his best interests.

Kunkle appeared aware of many aspects of the court process. During Redick's evaluation, Kunkle accurately identified his attorney as the person who would help him through the trial. He remembered the events leading to his charge, and he understood that the judge was in charge of the courtroom. Although Kunkle had a limited capacity to understand plea bargaining or mental defenses, he had some understanding of guilt and innocence.

On cross-examination, Redick stated that Kunkle's defense counsel would likely need to check with Kunkle regularly to ensure that Kunkle understood the proceedings. He believed that Kunkle could understand testimony describing what happened during the alleged offense. Redick also acknowledged many of Kunkle's deficits, such as mild deficits in knowledge and understanding of penalties, a moderate deficit regarding available defenses, a moderate deficit regarding knowledge of court participants, a severe deficit regarding courtroom procedures, a

moderate deficit in motivation, a moderate deficit regarding likely outcome, a severe deficit regarding testimony, and a severe deficit regarding strategies. But Redick clarified that each deficit operated independent of the other and the situation and demands made upon Kunkle would determine what difficulties Kunkle might have. Redick believed that Kunkle would not be able to participate in “parts of what occurred.” RP at 17. Ultimately, Redick believed that Kunkle understood what court is about.

Dr. Mark Whitehill, a licensed psychologist and certified sex offender treatment provider, testified on Kunkle’s behalf. After examining Kunkle, Whitehill concluded that Kunkle has a developmental disability and an adjustment disorder caused by his present confinement. Whitehill mostly agreed with Redick’s assessment, including that Kunkle understood the charges against him despite his denials to the contrary. But Whitehill believed that Kunkle’s deficits in being able to assist counsel, such as by challenging witnesses or engaging in legal strategy, was a larger deficit than his emotional coping. Whitehill also declined to give an opinion on the ultimate issue of Kunkle’s competency.

Kunkle testified and stated that he was in court “[f]or what I have done” but claimed that the police never told him about the charges. RP at 36. He also did not know if the court told him about the charge because he could not hear well. Kunkle’s counsel stated that he could not rely on Kunkle for assistance and that Kunkle could not follow all of the proceedings.

The trial court found Kunkle competent because (1) he had the capacity to understand the charges against him and (2) while he may have some trouble assisting counsel with trial strategy, the evidence did not overcome the presumption of competency. The trial court found that the

assistance he could provide counsel “will be limited assistance, that’s clear, but I think he can assist.” RP at 48.

A jury found Kunkle guilty of communication with a minor for immoral purposes. He appeals.

#### ANALYSIS

Kunkle contends that the trial court erred in finding him competent. He asserts that he did not have the ability to assist counsel.

A trial court may not try, convict, or sentence an incompetent person for the commission of a crime while his or her incapacity exists. RCW 10.77.050. “‘Incompetency’ means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(14). Washington courts presume a defendant’s competence. *See State v. Harris*, 114 Wn.2d 419, 432, 789 P.2d 60 (1990) (holding whether defendant’s evidence overcame the presumption of competence). “The trial court may make its determination from many things, including the defendant’s appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and the statements of counsel.” *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967).

We review a trial court’s competency determination for manifest abuse of discretion. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

As noted, Kunkle disputes only the second element of competency, whether he had the

ability to assist trial counsel in his own defense. He asserts that he could not assist his counsel in his own defense because he could not properly disclose information related to his defense or provide relevant information including past events.<sup>2</sup>

The “defendant’s ability ‘to relate past events which would be useful in assisting his attorney’ in whatever defense counsel decides is appropriate is an important consideration in determining his competency to stand trial.” *Harris*, 114 Wn.2d at 428 (quoting *Ortiz*, 104 Wn.2d at 483). But the “ability to assist” at trial requirement is minimal. *Harris*, 114 Wn.2d at 429.

No witness testified that Kunkle could not relate past events. Although both experts stated that Kunkle’s ability to assist counsel would be limited, those limitations related to Kunkle’s ability to participate in trial strategy or testimony, make decisions without a discussion of consequences with counsel, understand the nuances of complicated testimony, or challenge witnesses. These limitations did not relate to Kunkle’s ability to relate past events. Instead, both experts believed that Kunkle understood the charges against him. During his interview with Redick, Kunkle stated that “he remembered everything that happened at the time of the crime.” Clerk’s Papers (CP) at 13. When Redick asked Kunkle what the prosecutor claimed he did, Kunkle stated that no one told him but also “that he hadn’t talked to any kids.” CP at 13. Both

---

<sup>2</sup> The trial court must give considerable weight to defense counsel’s representations regarding a defendant’s competency. *State v. Israel*, 19 Wn. App. 773, 779, 577 P.2d 631 (1978). But most of Kunkle’s trial counsel’s statements centered on limitations that were irrelevant to a determination of competency, such as Kunkle’s ability to help with trial strategy and defenses. *Harris*, 114 Wn.2d at 428 (defendant need not be able to formulate strategy or defenses). Kunkle’s trial counsel did state that Kunkle would have trouble following the proceedings, but this echoed concerns expressed by both psychologists and considered by the trial court. The trial court gave Kunkle’s trial counsel’s representations the appropriate level of weight, even though it disagreed with counsel.

Redick and Whitehall found Kunkle's denials a defensive mechanism. Whitehall did express concern that Kunkle would have trouble sharing information with counsel "that might address legal strategy." RP at 30. But Redick opined that defense counsel could overcome this by building a trusting relationship.

Kunkle argues that the trial court erred because he could not understand all the proceedings of his trial without frequent breaks to check his understanding and that the frequent breaks would be unworkable. He cites *United States v. Calek*, 48 F. Supp. 2d 919 (D. Neb. 1999). *Calek* does not support Kunkle's argument.

*Calek* did not rely on a finding that taking frequent breaks would be unworkable in finding Calek not competent to stand trial. Although that court concluded frequent breaks would be "hardly workable" in a courtroom setting, the court found more relevant the defense expert's report listing Calek's greatest impediments. *Calek*, 48 F. Supp. 2d at 923. The Court agreed with that expert that Calek was not competent to stand trial because Calek could not (1) assimilate new information necessary to make decisions regarding his trial, (2) follow courtroom testimony or legal instructions, (3) consult with his lawyer with a reasonable degree of rational understanding, or (4) understand the facts of the proceeding against him. *Calek*, 48 F. Supp. 2d at 923. In contrast, Redick testified that Kunkle could follow witness testimony relating to the events surrounding the charges, could cope with the stress of the proceedings with the assistance of counsel, and understood the nature of the charges against him.

The trial court did not abuse its discretion in finding Kunkle competent to stand trial. The evidence supported its finding that he could assist his trial counsel in his defense.

No. 38093-5-II

No. 38093-5-II

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

---

Houghton, J.

We concur:

---

Armstrong, J.

---

Penoyar, A.C.J.